Federal Antidegradation Standard

for all surface waters, all pollutants, all activities

1) cannot make bad situation worse

2) can make a good situation a bit less good

only if "allowing lower water quality is necessary to accommodate important economic or social development in the area in which the waters are located

for Great Lakes Basin, restriction on BCC

State Antidegradation Implementation Procedures

- what is enough lowering of water quality to trigger demonstration?
- what is enough technical and economic information to answer question?
- what is the balance between lowering and development IDEM will use to decide in predictable, consistent and fair manner?
- what is the effective and efficient public engagement?

Types of Activities Possible

- new or increased NPDES Permit Limit
- 401 Certification of Wetland Filling or stream Bank cut
- nonpoint source storm water runoff
- constituents in NPDES discharge but without a limit
- other

Current
Indiana
Great Lakes Basin
implementation is for NPDES Permit Limit

Beranek 7-27-11

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Statement of Bowden Quinn, conservation program coordinator, Sierra Club Hoosier Chapter
Endorsed by Nicole Kamins Barker, executive director, Save the Dunes Council

The Hoosier Chapter of the Sierra Club urges the Water Pollution Control Board to preliminarily adopt the proposed antidegradation rule. While the rule isn't perfect, it is a good attempt to address the many competing interests at stake in this complicated area of the Clean Water Act. We thank the Office of Water Quality, and in particular Martha Clark Mettler, for persevering on the arduous journey that has brought us to this momentous point when the board can finally take action.

Fourteen years after the adoption of antidegradation implementation procedures for the Great Lakes, we are finally nearing the time when all of the state's water bodies will have this protection. I particularly want to thank IDEM for the effort it has made in 327 IAC 2-1.3-7 to ensure that applicant-funded water quality improvement projects in Outstanding State Resource Waters will actually result in overall improvement in water quality by requiring an applicant to submit to IDEM the same information for a funded project that it would provide if it were implementing the project itself.

I will leave most of our comments about particular parts of the rule to the lawyers who have so ably assisted us throughout this process. They will discuss some technical problems with the proposed rule that we trust can be resolved before final adoption. However, I do want to note our objection to the exception made for mercury in the antidegradation standard for Outstanding State Resource Waters in the Great Lakes basin [327 IAC 2-1.3-3(c)(1)]. There is no scientific justification for treating mercury differently than other bioaccumulative chemicals of concern. Mercury in our waters poses a significant health threat to children. We must not try to avoid dealing with that problem just because it is difficult to resolve.

The only other specific comments I will make are about the public meeting requirements in 327 IAC 2-1.3-6. The limitation of valid requests for a public meeting to people living or working within 15 miles of a proposed discharge is arbitrary and imposes an unnecessary burden on both IDEM and the public. People from farther away who enjoy a body of water for recreational or aesthetic purposes have a legitimate interest in seeing it protected, as do people who may live more than 15 miles downstream and outside of the 10-digit watershed. Furthermore, does IDEM really want to go to the trouble of verifying the addresses and workplaces of all the people who request a meeting? Requests from 25 people, no matter where they live or work, indicates sufficient public interest in a proposed discharge to warrant a meeting.

Secondly, we disagree with the prohibition of an applicant presenting its rationale for a proposed discharge at a public meeting organized by IDEM [327 IAC 2-1.3-6(c)(2)(B)(ii) and 327 IAC 5-2-11.2 (b)(3)(E)]. This provision is made to encourage applicants to hold their own meetings and we strongly support that desire. However, prohibiting applicants from presenting the rationale for a proposed discharge at an IDEM meeting penalizes the people who attend the meeting and may make conducting that meeting more difficult for IDEM as people demand information that the department is unable to provide. It is better to retain IDEM's ability to request that information from the applicant for its meetings and leave open the option of allowing an applicant to present its rationale at the meeting. To alert applicants to the importance of these meetings and encourage them to seriously consider holding their own meetings, language could be added to 327 IAC 2-1.3-5(g)(6) specifically stating that the commissioner will consider comments made at a public meeting in making a determination on a proposed discharge.

We hope to see these changes in the rule when IDEM presents it to the board for final adoption, which we hope will be before the end of the year. There is no reason to delay this rule any longer. Many people have worked long and hard—none more so than those in the Office of Water Quality—to create a workable rule that for the most part meets the requirements of the Clean Water Act and gives our waters the protection they deserve. We ask the board to show its support for that effort by preliminarily adopting the rule.

July 27, 2011

Water Pollution Control Board

Antidegradation Preliminary Adoption Hearing

Thank you Mr. Chairman and members of the Water Pollution Control Board for the opportunity to testify today. I am Vince Griffin, Vice President of Environmental and Energy Policy for the Indiana Chamber of Commerce.

The antidegradation rule has been many years in the making and it has come a long way. Special thanks go to Martha Clark Mettler and Steve Roush of the IDEM staff that have worked tirelessly on this project for some time. Thanks also to those other stakeholders – in and outside of the agency -- that have put in a tremendous amount of time and energy to produce the product we are discussing today.

It probably is worth repeating that at no time would the water quality standards be exceeded as the result of the antidegradation process. This is often forgotten.

While the document has been significantly improved, there remain areas of concern that are ambiguous and subjective. Here are a few examples:

- There is no bright-line or specific, fixed criteria that can be used by a stakeholder to clearly determine if an activity would require an antidegradation demonstration.

- If an antidegradation demonstration is required, how much research, analysis and written explanation would qualify as an acceptable demonstration of an effective alternative treatment technology or pollution prevention.

- How detailed will be the requirement to show that the rejection of the antidegradation allowance would negatively affect important social or economic area development. And, who makes that determination?

Additionally, from the beginning of this process, I have heard it stated that the necessary action related to antidegradation could be achieved through a non-rule policy document. If that is the case, the Indiana Chamber would support a non-rule policy document.

We appreciate the opportunity to present these thoughts today and recognize that this is preliminary adoption of the antidegradation rule and that there will be a comment period during which we will submit additional comments. The Indiana business community will continue to work with all stakeholders toward a workable rule. Thank you for your time.

SUMMARY OF JUNE 9, 2011 MEETING BETWEEN IDEM STAFF AND MEMBERS OF ENVIRONMENTAL COALITION ON DRAFT ANTIDEGRADATION RULE

PREPARED BY
JEFFREY HYMAN, CONSERVATION LAW CENTER
BRADLEY KLEIN, ENVIRONMENTAL LAW AND POLICY CENTER

SUBMITTED TO INDIANA WATER POLLUTION CONTROL BOARD, JULY 27, 2011

Summary of June 9, 2011 Antidegradation Meeting with Environmental Coalition

June 18, 2011

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Dear Martha, Bruno, Steve, and Dave:

Thank you once again for meeting with us on June 9th to discuss the May 6, 2011 draft of the Indiana antidegradation rule that is slated for preliminary adoption at the July 27th meeting of the Water Pollution Control Board. We appreciate the good discussion we were able to have about the environmental community's main remaining questions and concerns about the current draft of the rule. We hope that this summary of our discussion will help us continue the conversation about revisions or clarifications that could help expedite the remaining steps in this rulemaking process and improve the chances for U.S. EPA's approval of the final rule.

The following were in attendance at the meeting:

In person:

Martha Clark Mettler – IDEM
Bruno Pigott – IDEM
Steve Roush – IDEM
Dave Wagner – Water Pollution Control Board

Brad Klein – ELPC
Dick Miller – Sierra Club
Bowden Quinn – Sierra Club
Jeff Hyman – Conservation Law Center

On the phone:

Tim Maloney – Hoosier Environmental Council
Lyman Welch – Alliance for the Great Lakes
Nicole Barker – Save the Dunes
Barbara Sha Cox – Indiana CAFO Watch

DISCUSSION ITEM 1. MEANING OF "REGULATED POLLUTANT": DRAFT SECTION 1 AND SECTION 2(43).

The "trigger" for an antidegradation review is whether or not there will be a new or increased loading of a "regulated pollutant" as defined by the rule. There have been extended discussions of how to define the trigger throughout this rulemaking process. (In prior drafts they were called "pollutants of concern.") From our prior discussions, we understood that "pollutants of concern" would include any pollutants that could have a potentially detrimental effect on the designated or existing uses of a water if discharged in sufficient amounts.

During the meeting, we asked whether the change from "pollutant of concern" to "regulated pollutant" in the new draft rule had implications for the coverage of pollutants by the antidegradation rule. You stated that IDEM's intent was not to narrow the scope of pollutants covered by the antidegradation rule. You pointed out that key language in the definition of "regulated pollutant" is in Section 2(43)(B), which states that a regulated pollutant includes "any other parameter that may be limited in an NPDES permit." You highlighted that this definition is broader than currently limited parameters in existing NPDES permits, and includes any parameter that "may" be limited in "an" NPDES permit.

You also pointed out that at one end of the spectrum, there are substances for which very little information exists on potential harmful effects, and those substances are not going to be limited in any NPDES permit until more data are available. Those substances are thus not "regulated pollutants." At the other end of the spectrum are those pollutants currently limited in existing NPDES permits, which are clearly covered by the definition of "regulated pollutant." In between are substances for which we have information about harmful effects and for which we can rationally develop a permit limit, but which are not currently limited in existing permits. Once IDEM is aware of the pollutants an antidegradation applicant plans to discharge (if the antidegradation applicant already holds an NPDES permit, the applicant/permit holder has a duty to disclose new substances in its discharge), IDEM has an opportunity to develop a permit limit for that substance. A weakness in this process, however, may be in IDEM's process for developing new permit limits for newly regulated pollutants.

As discussed at length in the stakeholder process, it is important to remember that the threshold for requiring an antidegradation review for a regulated pollutant is lower than the "reasonable potential to exceed criteria" method that is typically used as the threshold for establishing WQBEL's. That is because antidegradation review is intended to protect the *assimilative capacity* of the water body, which by definition is the increment of water quality that is better than the criteria.

Takeaways:

- In guidance, IDEM should clarify its intent to use its "best professional judgment" to require antidegradation reviews for new or emerging pollutants present in a discharge where the scientific literature indicates that the pollutant has the potential to adversely affect aquatic life, recreation, or other designated or existing uses of a waterbody.

- In guidance, IDEM should clarify that the trigger for consideration as a "regulated pollutant" for the purposes of antidegradation review is not limited to those pollutants that have been determined to have a reasonable potential to violate water quality standards.

DISCUSSION ITEM 2. GENERAL PERMITS: DRAFT SECTION 1(C).

There have been extensive discussions in the stakeholder process of ways to reconcile general permits with case-specific antidegradation review. The environmental coalition submitted detailed comments on this issue in response to IDEM's second notice draft rule. We had hoped that the revised draft would respond to these comments and recommendations and include more detail on how IDEM intended to conduct antidegradation review of activities authorized by general permits. Unfortunately, the revised rule simply recites the statutory language at IC 13-18-3-2 rather than provide guidance or clarification for how this statute will be implemented.

In the meeting, we asked how IDEM intended to "complete an antidegradation review" of NPDES general permits as set forth in Sec. 1(c)(1) of the draft rule in order to ensure that there is some individualized review of projects that may lead to significant degradation. As Dave pointed out, a general permit shouldn't be automatic. Instead, the antidegradation review should lead to conditions in the general permit to ensure that:

1. sufficient information is provided in the applicant's notice of intent for general permit coverage (NOI) for IDEM to determine the magnitude of the proposed lowering of water quality;
2. there is adequate public notice and access to the information contained in these NOI's;
3. any water quality lowering resulting from use of the general permit has been determined to either be "insignificant" or "necessary to accommodate important social or economic development in the area of the water";
4. general permits will not be used if they would have the effect of lowering water quality in OSRWs or ONRWs; and

5. an individual permit will be required if the project would lead to significant degradation on an individual or cumulative basis.

During the meeting, you indicated that IDEM did not intend to allow the use of general permits to circumvent antidegradation requirements and that the agency will use its existing authority to require individual permits where it appears from the NOI that a proposed discharge may in fact lead to significant degradation of water quality. We recommended that you amend Section 1(c) of the rule to make these commitments explicit rather than implicit. We suggested that, at the very least, you thoroughly explain how general permits will be reviewed and processed as part of your rule submission package to U.S. EPA. A guidance document explaining the process to the regulated community and the public would also be very helpful.

Takeaway:

- Revise Sec. 1(c) to clarify that antidegradation reviews for general permits will meet the conditions outlined above.

DISCUSSION ITEM 3. MERCURY: SECTIONS 3(C) AND 4(A)

In Section 3(c) of the draft rule, mercury, a Bioaccumulative Chemical of Concern (BCC), is singled out and handled like a non-BCC in OSRWs within the Great Lakes basin (which includes the Indiana waters of Lake Michigan). A new or increased loading of mercury that causes a significant lowering of water quality would be allowed in OSRWs within the Great Lakes basin, even though significant loadings of other BCCs to those waters would be prohibited.

Similarly, in draft Section 4(a), mercury is handled like a non-BCC in ONRWs and Great Lakes basin OSRWs. A "short-term" exemption from an antidegradation demonstration would be allowed for mercury in ONRWs and OSRWs, even though the exemption is not provided for other BCCs discharged to those waters.

Because prior drafts of the rule have not handled mercury in this manner, we asked you to justify why significant loadings of mercury should be allowed in ONRWs and Great Lakes basin OSRWs even though significant loadings of other BCCs are not allowed. We asked why a proposal to increase mercury loading as a product of industrial process should not be treated like other BCCs. We pointed out that a mercury variance may be an available option and that the exemption in Section 4(A)(ii) would render "nonsignificant" any new or increased loading resulting from a "change in intake water pollutants not caused by the discharger."

In response, you suggested that one justification for handling mercury differently than other BCCs may be that POTWs may not be able to control the input of mercury-tainted sewage into the treatment process and thus the POTWs would not be responsible for outputs of mercury in their effluent. You may not have considered whether such a situation is covered by the Section 4(A)(ii) exemption from "significance." In any event, if IDEM believes a particular situation such as intake of mercury-tainted sewage to POTWs should be exempted from "significance" and handled differently than other BCCs, then IDEM can draft a rule provision

narrowly tailored to that situation and submit the factual justification for the provision in its promulgation package to EPA. The current draft exemptions for mercury are, however, too broad, and to our knowledge have not been justified by data. A blanket free pass for mercury loadings into ONRWs and Great Lakes basin OSRWs is the wrong approach and is unlikely to be approved by EPA.

Takeaway:

- The record does not justify the blanket exemptions for mercury loadings and it is not clear how these exemptions could be approved by EPA.

DISCUSSION ITEM 4. HANDLING OF TRIBUTARIES TO OSRWS: SECTIONS 3(C) AND 6(B)

This discussion was grounded in the notion that when attempting to protect the water quality of a particular water, such as a lake, discharges into upstream tributaries must be considered along with direct discharges into the water because the upstream discharges may lower the water quality downstream. In other words, both direct and indirect discharges to the water must be considered.

This commonsense notion is expressly recognized in two provisions in the current draft rule. Section 3(a)(1)(b)(ii) calls for controls on point and nonpoint sources to ensure that "any designated use of a downstream water is maintained and protected." Section 3(d)(2)(B) states, "A discharge to a tributary of an ORNW . . . shall not be allowed if it would cause an increase in the ambient concentration of that pollutant in the ORNW."

Furthermore, the requirements in draft Section 7(a) for water quality improvement projects implicitly incorporates this notion of upstream discharges having downstream effects by applying the requirement when a discharger proposes "to cause a significant lowering of water quality in an OSRW" and for "each activity undertaken that will result in a significant lowering of water quality in an OSRW." The use of the words "cause" and "result" imply that the discharge that causes or results in the lowering of water quality in the OSRW may be either a discharge directly to the OSRW or a discharge to a tributary that flows into the OSRW.

Throughout the new draft rule, however, previous references to "portions of waters upstream of an OSRW that impact the water quality of the OSRW" have been stricken. You said that this change was justified because now all waters of the state are subject to the same uniform de minimis standard – i.e., no more than 10% of available capacity individually used and 90% of benchmark available capacity cumulatively maintained. But as we pointed out at the meeting, in at least two subsections the reference to upstream waters was stricken even though the subsections are unrelated to the de minimis standard.

First, Section 6(b) provides a public meeting on an antidegradation demonstration if "the proposed discharge is to an OSRW." The prior draft version of the rule had the following language: "[if] the proposed discharge is to an OSRW or to portions of waters upstream of an OSRW that impact the water quality of the OSRW." Your concern appears to be that a public meeting should not be held for significant discharges to tributaries of OSRWs unless there is an

associated significant lowering of water quality in the OSRW itself. This subsection could easily incorporate both of our concerns by stating the following:

> . . . The commissioner shall hold a public meeting on the antidegradation demonstration in accordance with 327 IAC 5-2-11.2 if:
>
> (1) the proposed discharge will result in a significant lowering of water quality in an OSRW, irrespective of whether the discharge is directly to the OSRW or to an upstream water that flows into the OSRW.
>
> * * *

Second, Section 3(c)(1) provides, "For OSRWs inside the Great Lakes basin, no new or increased loading of a BCC except mercury shall be allowed that causes a significant lowering of water quality of the OSRW." The prior draft version had the following language: "(1) For OSRWs inside the Great Lakes basin, as well as the portions of waters upstream of an OSRW that impact the water quality of the OSRW inside the Great Lakes basin, no new or increased loading of a BCC shall be allowed that causes a significant lowering of water quality of the OSRW." The language of the prior draft clearly and properly incorporated the notion of upstream discharges significantly lowering water quality in the downstream OSRW. Moreover, the prior draft language served your purposes because Section 3(c)(1) would not have prohibited a discharge to a tributary unless that discharge "caused" a significant lowering of water quality of the OSRW itself. By striking the phrase "as well as the portions of waters upstream of an OSRW that impact the water quality of the OSRW inside the Great Lakes basin," you have unnecessarily narrowed the application of Section 3(c)(1) to new or increased loadings directly into the OSRW and have deleted application of the Section to new or increased loadings in tributaries even if those loadings cause a significant lowering of water quality of the OSRW.

Takeaways:

- Revise Section 6(b) to clarify that a public meeting will be held if a proposed discharge would cause a significant impact to a downstream OSRW.

- Restore the deleted language in Section 3(c) so that the intent of the Tier 2.9 section is not defeated by allowing discharges into tributaries of OSRWs to significantly degrade the OWRWs downstream.

DISCUSSION ITEM 5. SHORT-TERM EXEMPTION: SECTIONS 4(A) AND (B)

During the meeting, we expressed our concern that although the exemptions for "short-term" loadings in Sections 4(a) and (b) are improved from early drafts of the rule, a remaining problems is that there is still no consideration of the magnitude of exempted loadings, particularly the cumulative effect of multiple exempted loadings on the assimilative capacity of the water. We pointed out that EPA views this exemption as requiring both a time component and a magnitude component:

> A direct or upstream source that would result in a temporary *and* limited effect on ONRW water quality may be authorized. . . . As a *non-binding* rule of thumb, activities with durations less than one month *and* resulting in less than a 5% change in ambient concentration will be deemed to have temporary and limited effects.

(Emphasis in original).[1]

We also pointed out that IDEM's response to this concern, as expressed in IDEM's responses to our 2nd-notice comments, was inadequate because (1) the requirement that "all reasonable methods for minimizing or preventing the new or increased loading must be taken" does not require an assessment of the cumulative effects of the exemption; (b) the requirement that "any short-term, temporary discharge authorized in a NPDES permit will be required to meet any applicable water quality-based effluent limitations" does not address the actual effects of the exemption on assimilative capacity of a waterbody (meeting the WQBEL's is not the issue and can be assumed); and (3) the fact that the referenced EPA guidance from Region VIII "is just a 'non-binding rule of thumb' for facilities in Region VIII" does not negate the importance and wisdom of considering the cumulative magnitude of "short-term" exemptions on assimilative capacity. If IDEM will not provide for an assessment of such effects in the rule, then IDEM should provide in guidance and in the promulgation package to EPA a plan for how IDEM would respond to multiple requests for "short-term" exemptions and how it would consider the cumulative effects of multiple "short-term" impacts.

Finally, we asked how even a temporary discharge of mercury into a waterbody, as allowed under draft Section 4(a), would meet the requirement in Sections 4(a)(4) and 4(b)(4) that the "the discharge will result only in a short-term, temporary (not to exceed twelve (12) months) lowering of water quality," given that mercury bioaccumulates in living tissue and is very persistent in the environment.

Takeaways:

- Revise Section 4(a) and 4(b) to ensure that the *magnitude* of a proposed loading is accounted for as well as its timing when determining whether it qualifies for an exemption from antidegradation review.

- Clarify the circumstances in which discharges of BCCs can be considered to have only "short-term" effects on water quality considering the fact that BCCs bioaccumulate in tissue and are persistent in the environment.

DISCUSSION ITEM 6. PROBLEMS WITH USING PROPOSED EFFLUENT FLOW TO CALCULATE LOADING CAPACITY: SECTION 2(53)

The calculation of total loading capacity, and thus the calculation of available loading capacity, includes the new or increased effluent flow proposed by the antidegradation applicant. We are concerned that in low-flow streams especially, multiple new or increased loadings of a pollutant will be granted de minimis exemptions if the loadings are associated with added effluent flows. We pointed out at the meeting that in the May 15, 2009 comments by EPA on a past draft of the rule, EPA stated that to the extent that this provision effectively allows for an infinite number of "de minimis" increases as long as there is a corresponding flow increase, it

[1] U.S. EPA Region VIII Guidance: Antidegradation Implementation (August 1993), Part IV(D), Page 11.

seems inconsistent with the intent of the Federal regulations at 40 CFR 131.12(a)(2) and 132, Appendix E, I.B. and is likely to be the litigated if approved by EPA.

You responded that including the new or increased effluent flow in the calculation of "total loading capacity" is consistent with EPA guidance for calculations on permit limits, and that not doing so produces absurd results.

We then pointed out that a loophole in the draft rule arises if the proposed new or increased effluent flow is used to calculate loading capacity because the applicability of the rule is limited to new or increased "loadings" only, and does not account for "concentration." We discussed the following scenario. An applicant's new loading of a pollutant to a low-flow stream is granted a de minimis exemption because the proposed new loading will be accompanied by sufficient new effluent flow that reduces the concentration of the pollutant. Assume that six months later the discharger reduces the proposed amount of effluent flow, for whatever reason. But because Section 1(b) of the draft rule states that the rule's procedures apply only if a new or increased "loading" occurs,[2] without regard to a change in the concentration of the pollutant, the antidegradation rule provides no authority to recalculate and reconsider whether the new loading is still de minimis.

Takeaway:

- Amend the applicability Section 1 and the definition of "degradation" in Sec. 2(14) to include increases in loading *or concentration* of a regulated pollutant in order to avoid the loophole of a discharger reducing the assimilative capacity of a waterbody by reducing effluent flow after a de minimis exemption has been granted for a loading.

DISCUSSION ITEM 7. Issues of Spatial Scale in Calculation of Total, Available, and Used Loading Capacity, Benchmark Available Capacity, and De Minimis: Sections 2(2), 2(53), and 4(C)

We argued during the meeting that carefully considering the spatial scale at which loading capacity is calculated is critically important for an accurate determination of the impact of a loading on water quality and to ensure consistency with federal regulations. Yet, as we pointed out, the draft rule does not identify the location at which water quality calculations are to take place.

In the draft rule, to be considered de minimis, each individual new or increased loading of a regulated pollutant must use less than or equal to 10% of the "available loading capacity" determined at the time the loading is proposed. Moreover, 90% of the available loading capacity established at the time of the request for the "initial increase" in the loading of the regulated pollutant (i.e., the "benchmark" available capacity) must remain given the proposed loading

[2] Draft Section 1(b): Except as provided under section 4 of this rule, the antidegradation implementation procedures established by this rule apply to a proposed new or increased loading of a regulated pollutant to a surface water of the state that will result from a deliberate action including a change in process or operation that:

(1) adds additional regulated pollutants; or

(2) creates an increase in loading of a regulated pollutant already being discharged.

combined with the other sources of the regulated pollutant (the earliest date on which the benchmark available capacity is determined appears to be the date a new antidegradation rule is approved).

We asked you to consider the river system illustrated in Figure 1 below.

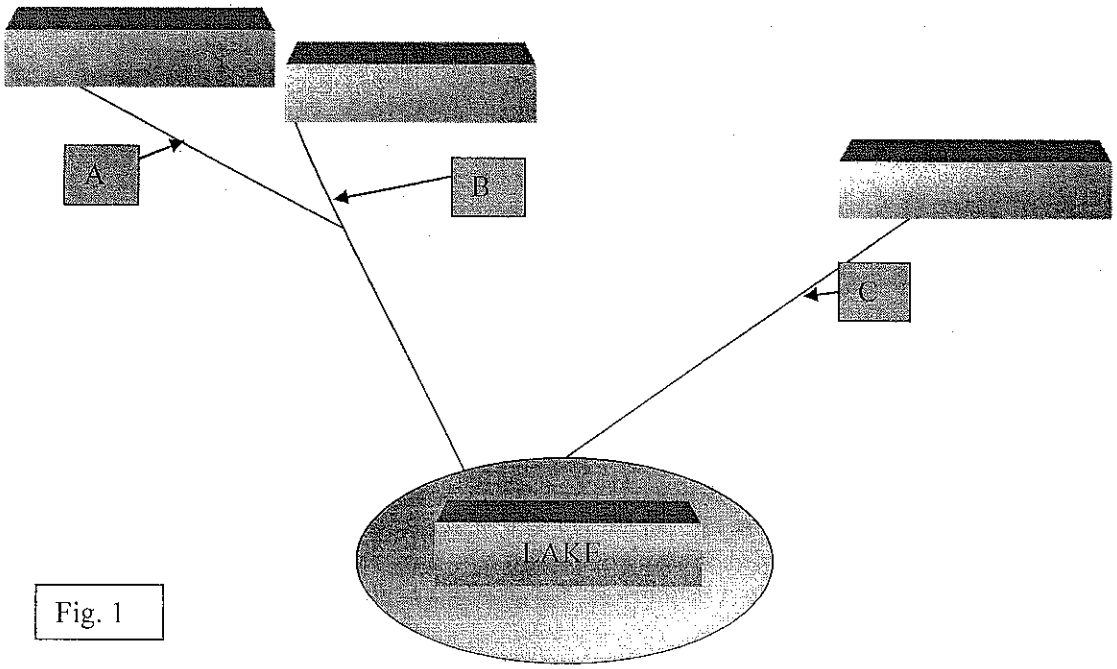

Fig. 1

In this hypothetical scenario, three facilities (A–C) discharge pollutant X at various points in the stream system, which flows into a lake. Facility "A" is the first to propose an increased loading of pollutant X along with an increase in effluent flow; then facility "B" proposes an increased loading and lastly facility "C."

When any facility proposes to increase loading of pollutant X into the stream, the increased loading may use existing assimilative capacity locally in the stream segment as well as system-wide as measured at the inlet to the lake. Both effects are important and neither can be ignored.

On the one hand, unless the used loading capacity, the available loading capacity, and the benchmark available capacity are measured at the downstream point in the water system, the effect of the increased loading on the assimilative capacity of the lake will remain undetermined. Note that the local effect of the loading on the tributary's assimilative capacity may not reveal the downstream effect on the lake's assimilative capacity. For example, in Figure 1, after facility "A" uses a portion of the lake's assimilative capacity, a proposed increased loading by facility "B" or "C" may violate the 90% benchmark capacity at the lake even though the local tributary effect of the loading is de minimis. The effect of a facility's loading on the lake is especially important if the lake is an OSRW such as Lake Michigan. Draft Section 7 of the rule cannot be

implemented without knowing whether a proposed new or increased loading in a tributary to an OSRW will "cause" a significant lowering of water quality in the OSRW.

Furthermore, the draft rule defines the benchmark available capacity in Section 4(c)(1)(A)(ii) as "ninety percent (90%) of the available loading capacity established at the time of the request for the initial increase in the loading of a regulated pollutant." If the geographic scale of "initial increase" is the local tributary, each facility will get a new benchmark when it proposes an increased loading of pollutant X, but this scheme defeats the purpose of a cumulative cap. Thus, the geographic scale of "initial increase" must incorporate downstream cumulative effects. You pointed out that an existing Non-rule Policy Document on determining downstream impacts of upstream discharges for the Great Lakes system could be used as a basis for guidance on downstream determinations within and outside of the Great Lakes system.

On the other hand, measuring loading capacity and available capacity only at the downstream point may leave undetermined the local effect of a facility's proposed loading. A loading may be "significant" at the upstream point even though it is de minimis at the downstream point (because of more flow at the downstream point). If the loading is significant at the local scale of the tributary, the antideg demonstration may require a local evaluation of social and economic conditions. For example, the local tributary into which the facility discharges may contain species of concern, making the local effect on assimilative capacity important. Also, the tier 2 and 2.9 antidegradation standards in draft Section 3 require that the social and economic importance of the proposed project be evaluated "in the area in which the surface waters are located." Although the phrase "in the area" is not specified, it must be interpreted in light of the geographic area in which the majority of the facility's workers live and in which the facility contributes to the community tax base. If Figure 1 represents a large watershed, the "area in which the surface waters are located," with respect to facility "A's" loading, may be far from the inlet to the lake.

To summarize, if you measure loading capacity in the tributary only, you can repeatedly put new or increased loadings in different tributaries/mixing zones without counting the impact downstream. But if you calculate capacity downstream only, you may not account for significant local impacts in the tributary. You asked what the solution is to this problem of scale, and we responded that, especially for Lake Michigan, the effect of a proposed new or increased loading on assimilative capacity and the determination of its "significance" must be evaluated at both the local upstream area and the cumulative downstream area.

Takeaways:

- Clarify either through rule amendment or a guidance document the method by which IDEM will calculate individual and cumulative impacts in order to ensure that the impacts of de minimis discharges are considered at an appropriate geographic scale.

- Consider using Non-rule Policy Document #1 to ensure that IDEM's calculation of de minimis discharges appropriately account for impacts to downstream water bodies, especially OSRWs such as Lake Michigan.

DISCUSSION ITEM 8. EXEMPTIONS FROM SOCIAL AND ECONOMIC ANALYSIS FOR ACROSS-WATERSHED AND INTER-MEDIA POLLUTION TRADING: SECTIONS 5(B)(5), 5(B)(1), AND 5(D)(2)

Although various pollutant trading proposals could represent an overall net benefit to the environment, there must be a mechanism for IDEM to distinguish "good" trades from "bad" trades. As we discussed in the meeting and summarized below, the current blanket exemptions for across-watershed and inter-media trades do not allow IDEM or the public to determine whether a specific trading proposal is a good one. The information that would be generated by an antidegradation socioeconomic review is exactly the kind of information that is necessary for IDEM to determine whether a trading proposal is worth pursuing.

Section 5 of the draft rule exempts particular activities from components of the requirement that the applicant demonstrate that a new or increased discharge is necessary to accommodate important economic or social development in the area in which the waters are located. That is, the draft rule exempts particular activities from a full antidegradation demonstration. Although IDEM does not claim that the lowering of water quality associated with these activities are "insignificant," these exempted activities are subject to only the first component or first two components of the antidegradation demonstration. These exempted activities appeared in prior drafts of the rule as "exemptions" from *any* antidegradation demonstration. In the new draft rule, the specified activities are still exemptions in so far as the activities are exempted from a full demonstration that the proposed lowering of water quality is necessary to accommodate important economic or social development in the area in which the waters are located.

As we have argued in comments on past drafts of the rule, any "exemption" from the full antidegradation demonstration, to be consistent with the perspectives of EPA and the courts, must be associated with at least one of three types of situations: (1) changes in loading result in a de minimis decrease in water quality in the receiving waterbody over the range of likely loadings, including a "temporary" lowering of water quality; (2) the applicant has already submitted the required information and this submittal sufficiently substitutes for the omitted component of the antidegradation demonstration; (3) IDEM presents factual information in the record supporting the assertion that the omitted component of the antidegradation demonstration is satisfied for all of the activities covered under the exemption. If at least one of these criteria is not met, it is not sufficient to require only "some level" of an antidegradation demonstration for activities that result in a significant lowering of water quality. Draft Sections 5(b)(5), 5(b)(1), and 5(d)(2) in particular are inconsistent with the federal regulations because none of the above three criteria have been met.

Draft Sections 5(b)(5) and 5(b)(1) are both intra-watershed pollution trades. At the meeting we pointed out that even if these provisions arose from specific scenarios that IDEM believes create social and economic benefits for the area in which the waters are located, these provisions as written are overly broad and the activities potentially included cannot be justified as a class.

Draft Section 5(b)(5) allows, without a socioeconomic justification, a significant decrease in water quality to occur at one location of a HUC-10 watershed so long as a decrease in loading at another location in the watershed offsets the increase at the watershed scale. Although the required net decrease in loading at the watershed scale may produce an improvement in water quality at the outlet of the watershed, there is no reason to believe that this trade would accommodate important economic or social development in the area in which the waters are located, as required by the tier 2 and 2.9 standards. Although the phrase "in the area in which the waters are located" is not specified, it must be interpreted in light of the geographic area in which the majority of the facility's workers live and in which the facility contributes to the community tax base. A HUC-10 watershed is simply too large a geographic scale to assure generally that the community affected by the increased loading will realize a social or economic benefit. What is "beneficial" for the watershed is not necessarily beneficial for the community "in the area in which the waters are located." A social or economic benefit "in the area" could be assured only if the increased loading occurred in close proximity to the decrease in loading, or generally if the increased loading occurred in close proximity to an improvement in water quality created by the trade. But draft Section 5(b)(5) is not narrowly tailored to those circumstances and would include activities that do not meet that criterion.

As EPA has stated regarding these watershed-scale trading exemptions [designated 327 IAC 2-1.3-4(b)(3)(B) and 327 IAC 2-1.3-4(b)(4)(A) in the previous draft rule],

> [These exemptions] contemplate offsetting new or increased discharges with other actions within the same ten digit HUC. Offsetting provisions may be an acceptable basis for determining that antidegradation review is not triggered if it is clear that the offset results in no change in water quality at the point where the new or increased discharge will occur. It is not clear that the spatial relationship between such actions will be such as to ensure that this requirement will be met in all circumstances that would qualify for this exemption. EPA recommends that these exemption provisions for these actions be removed from the antidegradation rule and addressed through the antidegradation review process on a case-by-case basis or provide the data and analysis necessary to satisfy the antidegradation demonstration requirement for all the activities that might fall under one of these exemptions.

LSA Document #08-764 RTC Second Comment Period, page 7. IDEM's response to EPA's above comment was nonresponsive because requiring "some level of an antidegradation demonstration" – i.e., the alternatives analysis of draft Section 5(c) – does not solve the problems with these exemptions, and EPA was not referring to Section 4 of the "revised draft" we are now discussing. As we pointed out at the meeting, good pollution trades cannot be distinguished from bad trades without the information from the socioeconomic analysis component of the antidegradation demonstration.

Draft Section 5(b)(1) also describes pollution trades across a HUC-10 watershed. At the meeting you discussed a specific scenario covered by this exemption for which you believed the socioeconomic information in the antidegradation demonstration has already been submitted as part of the permitting process. But it appears that Section 5(b)(1) is not narrowly tailored to that specific scenario you mentioned, and instead appears designed as a catch-all for various

activities, some of which may not be justified by existing information on socioeconomic importance.

Finally, draft Section 5(d)(2) allows, without a socioeconomic justification, a significant decrease in water quality to occur if the new or increased loading is necessary to accomplish a reduction in the release of one or more air pollutants, and if the reduction in the loading of the air pollutant will substantially reduce human exposure to an air pollutant subject to state or federal air quality standards. Air pollutants subject to federal national ambient air quality standards are carbon monoxide, sulfur dioxide, ozone, lead, nitrogen dioxide, and particulate matter. This exemption thus assumes a "significant" lowering of water quality will always create a social or economic benefit if there is a corresponding "significant" reduction in one of those air pollutants, irrespective of the fact that Indiana is in compliance with the air standards for those pollutants. You did not refer us to any factual information, nor are we aware of any, that would justify that assumption. How can we assume that a further reduction in an air pollutant that already meets air quality standards provides an incremental benefit sufficient to outweigh a significant reduction in water quality? As with draft Sections 5(b)(5) and 5(b)(1), this exemption describes activities that require a full demonstration of economic or social importance on a case-by-case basis in order to distinguish good from bad pollution trades.

Takeaway:

- Eliminate exemptions 5(b)(5), 5(b)(1), and 5(d)(2) in order to ensure that trading proposals are appropriately evaluated for their overall socioeconomic benefit before being approved.

DISCUSSION ITEM 9. BADCT: SECTION 5(E)

IDEM has been proposing the use of a technology-based treatment limit as a way to expedite and simplify a full evaluation of technology alternatives since the beginning of this rulemaking process. The theory is that there would be no need to conduct a rigorous professional evaluation of different treatment options if the applicant simply selects effluent limits based on the best treatment technology commonly available. Although we do not dispute this in theory, we have had several concerns about how this would be implemented in practice.

One concern is that the BADCT option not be used to replace a full consideration of whether or not degradation is "necessary" in the first place. In other words, an applicant should not proceed to the choice of treatment options until he or she has first ruled out the feasibility of nondegradation and mitigation techniques or alternatives. In our meeting, you clarified that the rule has been modified to require this demonstration of "necessity" in Section 5(c) before the treatment alternatives (and BADCT option) are considered in Section 5(e). We welcome this revision and note that it does indeed appear to satisfy this concern.

Another concern we discussed at our meeting was that there needs to be some process in place to regularly review and update BADCT limits to ensure that the limits continue to reflect the best control technology available as treatment technology continues to improve. We understand that IDEM intends to address this in guidance or in the rule submissions to EPA.

Although we did not discuss this point during our meeting, we continue to believe that it is important to set a BADCT limit for phosphorus discharges from POTWs, especially now that the definition of "regulated pollutant" now explicitly includes nutrients. We note that POTWs discharging in the Great Lakes Basin (including Indiana POTWs) have been meeting a limit of 1.0 mg/L phosphorus for decades and more stringent limits are certainly technically feasible.

Takeaways:

- Clarify the process that IDEM will use to ensure that BADCT limits are regularly reviewed and updated as necessarily to keep up with technological innovation.

- Clarify the process that IDEM will use to ensure that BADCT limits are set for an appropriate range of pollutants, including phosphorus.

July 27, 2011

LSA Document #08-764 (WPCB)(Antidegradation)

RE: Indiana Farm Bureau/Indiana Pork Advocacy Coalition Comments

The Indiana Pork Advocacy Coalition and Indiana Farm Bureau, Inc. appreciate the opportunity to express our thoughts and concerns on this proposed rulemaking to IDEM and the Water Pollution Control Board (WPCB) both through these joint written comments and through public testimony. We understand the complexity of the antidegradation issue and this particular rulemaking. How to address the policy on antidegradation has been fraught with uncertainty and disagreement by the majority of parties involved because of the lack of clear direction from the federal level and in the authorizing statutory language. It would appear that the concepts in the rule are based upon a rule originally used for new or increased loading of a parameter with an NPDES permit limit in the Great Lakes Basin. Molding those regulations into a rule with statewide application governing all discharges that impact water quality is an enormous undertaking. While this is a valid approach, making this a statewide focus with all of the different circumstances and conditions present can make it an extremely complex process for compliance in the future.

We respect the time, resources and effort IDEM management and staff have put toward this monumental task. However, we remain concerned that compliance with this rule will be difficult if not impossible to achieve. We offer these comments to redirect the work done so far to a more narrowed scope. Significant changes are still needed for this rule, although we do believe that it is now at least workable for facilities which discharge pollutants with a permit limit. For those who do not have an NPDES permit and NPDES permit holders with pollutants for which no numerical permit limit is set, this rule appears unworkable.

As our organizations represent the interests of Indiana agriculture, our comments in regard to limiting the scope of this rulemaking will focus on how this proposed rule, if adopted as written, would be impossible to apply to agricultural operations and any resulting discharges or runoff which they may have.

Pollutants Subject to an NPDES Permit Limit

Our overarching recommendation to IDEM and the WPCB is that this proposed rule be amended to apply only to entities applying for or who already possess an NPDES permit and only for pollutants with an NPDES permit limit. For farmers, there are two main concerns with a rule of broad applicability to "regulated pollutants." First, it is not entirely clear what would be considered a regulated pollutant. More specifically for agriculture, if nutrients are explicitly included in the definition of "regulated pollutant" but no numeric water quality criteria have been developed, how will the regulated community know how this proposed rule applies to nutrient loading? It is unclear how this proposed rule applies in regard to narrative criteria. We do believe that "regulated pollutant" is better terminology than "pollutant of concern" which was used in the previous version of this rule. However, nearly anything can be considered a pollutant so there must be some way to identify for the regulated community what is subject to the antidegradation review.

The second concern farmers have with this proposed rule is just how it will apply to agricultural activities. The issuance of NPDES permits for agricultural operations has been in a state of flux for the past several years. Following several lawsuits and subsequent rulemakings, the universe of who is required to obtain an NPDES permit for livestock and poultry production has been narrowed, but the true scope and meaning of those permits is still not certain.

With agricultural operations, there are two types of discharges: intentional and unintentional. Intentional discharges are those where the farm is operated in such a manner that it has a direct discharge to a navigable water of the US, such as through the discharge of non-contact cooling water or effluent following filtration of wastewater. Few agricultural operations actually have these types of discharges.

The more common type of discharge is that which occurs outside of the control of the farmer. Generally, discharges due to agricultural runoff are intermittent, periodic discharges during periods of very high flow due to large rainfall events that may or may not actually increase loading into a receiving water. Most normally, they are the loss of nutrients and sediment following application of fertilizer and tillage or planting. They are unwanted events, but events which are nonetheless outside of the control of the farmer. Even under ideal circumstances, there will be some loss of nutrients, such as through leaching. However, rain events can lead to greater loss of nutrients and sediments, resulting in damage to crops through lost potential of productivity and economic loss to the farmer.

These types of nutrient losses are not subject to an NPDES permit. 40 CFR 122.2 defines "discharge of a pollutant" as "...[a]ny addition of any "pollutant" or combination of pollutants to "waters of the United States" from any "point source,"...." However, at 33 USC 1362(14), the term "point source" specifically excludes "...agricultural stormwater discharges and return flows from irrigated agriculture." Thus, we may surmise and do assert that those runoff events are not to be considered for purposes of antidegradation review. Nonetheless, a literal reading of proposed 327 IAC 2-1.3-1 and 327 IAC 2-1.3-3 create concern that nonpoint sources of pollutants such as runoff from a rain event may be subject to regulation under this rule.

This rule as proposed would force discharges that only exist during very high flow into a set of parameters where the trigger for an antidegradation demonstration was originally designed to be calculated based on the lowest flow of the receiving water. When the receiving water is at its lowest flow, the chance of an agricultural discharge is at its very lowest. Agriculture simply does not fit into this regulatory mold created to govern longer term, planned discharges relating to parameters with NPDES permit limits. Further, as illustrated above, even if this proposed rule was limited in scope to NPDES permit holders, this type of nutrient loss would still not be a candidate for an antidegradation demonstration as it is not a point source discharge.

An exemption is granted at 327 IAC 2-1.3-4(c) for discharges of a regulated pollutant that represent a de minimis lowering of water quality, with an accompanying calculation to determine whether the "proposed net increase in the loading of a regulated pollutant is less than or equal to ten percent (10%) of the available loading capacity...." (327 IAC 2-1.3-4(c)(1)(A)(i)) These calculations require knowledge of the concentration of what is already in the stream, an understanding of the loading capacity for that parameter that is left for dilution into the water body and what the water quality standard is for the parameter in question. Who but an NPDES permit holder would have the ability to calculate this? Moreover, how would anyone but an NPDES permit holder with an actual point source discharge in a controlled environment know the level of the proposed new or increased loading? It would appear that the relevant information for this determination would lie solely with an existing NPDES permit holder and only for parameters with an existing NPDES permit limit.

We assume that anything above this de minimis calculation is considered a significant lowering of water quality, thus triggering the requirement for an antidegradation demonstration unless some other exemption in 2-1.3-4 applies. If this rule is to apply to all new or increased loadings, what is the standard by which loading of parameters without NPDES permit limits are to be considered de minimis? Are we to assume that a significant lowering of water quality for parameters without NPDES permit limits is reached by any discharge level above zero? Of course, that is an unworkable standard.

Some proposed discharges may well be zero. The vast majority of CAFOs seeking an NPDES permit will not discharge a single gallon of effluent from that facility. We understand from IDEM's Response to Comments From the Second Comment Period that antidegradation review will be required "If an NPDES permit is issued to a CAFO with the allowance for a discharge..." which indicates that since most CAFO NPDES permits do not authorize a discharge from the facility, no antidegradation review would be required. Under this proposed rule, similar logic would seemingly apply to CFOs, which are also designed not to discharge from the facility and thus also would not require antidegradation review.

Our major issue exists where discharges are known not to be zero, but the frequency, amounts, and locations are all unknown. This is the case with agricultural runoff caused by storm events. A "de minimis" standard of zero is completely unworkable, but there is no way to quantify the amount, time and place of a runoff of nutrients in order to attach a de minimis standard to it. Even if this were possible, the loading capacity of the receiving water in this type of situation would have almost always been drastically changed by rainfall, making the use of the low flow as the basis for the Available Loading Capacity calculation unrealistic.

There are also procedural difficulties inherent in the application of this proposed rule to discharges other than pollutants subject to an NPDES permit limit. Built into this regulatory program is a definite time to consider the antidegradation review question: at the time a new or increased loading of a pollutant with an NPDES permit limit is proposed. As noted above, the vast majority of agricultural impacts to water are through non-point source discharges as a result of a storm event. Even for those farms which have an NPDES permit, it is likely that the challenge will lie with storm events leading to an unintentional addition of a pollutant to a water rather than through any sort of proposed discharge for which a prior determination could be completed.

Again, we commend IDEM for developing a proposed rule that, with some modification, could be very effective as an implementation regulation for antidegradation statewide. Unfortunately, this is only true for parameters with NPDES permit limits. As such, the proposed rule should be amended to reflect this reality.

Exemption for Agricultural Runoff

As discussed above, the most appropriate way to make this rule functional is to limit its scope. However, if this proposed rule continues to apply to all additions of regulated pollutants to surface waters, we propose that agricultural runoff caused by a storm event should never trigger an antidegradation review.

An exemption of the type found at 327 IAC 2-1.3-4 could be created for intermittent, non-permitted discharges like agricultural runoff. If similar requirements to those listed at 327 IAC 2-1.3-4(a)(1-5) were to apply to all surface waters of the state for non-point source discharges, this proposed rule would be much less unwieldy. The factors already listed within the proposed rule fit agricultural runoff perfectly:

327 IAC 2-1.3-4(a)(1): following existing regulations and best practices both for organic and inorganic fertilizer application can minimize or prevent increased loading.

(2): Agricultural runoff is related to stormwater, making it very short term and sporadic; certainly lasting less than 365 days.

(3): There is no mechanism for certification for commercial fertilizer applicators through IDEM, although CFO operators are authorized to land apply manure in accordance with their permit and they will soon be subject to regulation by the office of the State Chemist

(4): Intermittent discharges at times of very high flow will not have a lasting impact on water quality

(5): There are no established numeric criteria for nutrients.

Given the uncertainty which would be created if this rule were to be interpreted to apply to additions of pollutants such as nutrients caused by rain events, we suggest that a clear exemption for those events be delineated.

Public Meetings

In 327 IAC 2-1.3-6(c)(2), we recommend an applicant not be prevented from presenting at a public meeting the very purpose of which is to discuss the nature of the discharge the applicant is proposing. The only entity IDEM would be restricting is also the only entity with firsthand knowledge of the nature of the discharge being proposed. Do not penalize the regulated community for not conducting a meeting that no regulation requires them to conduct.

Our experience with public meetings and hearings has been significant over the last several years with respect to the construction and regulation of livestock operations. The main complaint we have heard about those meetings is that those in opposition to a proposed permit do not believe that they received adequate information about the proposed activity. At the same time, the regulated community often feels that the information stated by the public, or the responses given by IDEM, are not factual with respect to the proposed farm. By giving the applicant the opportunity to address the public, these types of concerns would be greatly reduced.

Conclusion

Our members remain concerned about the progress of this proposed rule on antidegradation. While we all value clean water and do not want to see water quality degraded, those subject to the regulation must be subject to a rule capable of comprehension. More importantly, the rule must be one with which compliance can be achieved.

We ask that you consider these comments before adopting the rule and urge that the members of the Water Pollution Control Board not pass this rule for adoption at the present time. We appreciate the opportunity to contribute to the discussion and ask any questions on this proposed rule may be addressed to either of the undersigned.

Respectfully submitted,

Josh Trenary
Indiana Pork Advocacy Coalition

Justin T. Schneider
Indiana Farm Bureau, Inc.

STATEMENT OF [INSERT NAME] ON BEHALF OF THE INDIANA UTILITY GROUP BEFORE THE WATER POLLUTION CONTROL BOARD REGARDING DRAFT ANTIDEGRADATION RULES

JULY 27, 2011

My name is John Humes of Hoosier Energy Rural Electric Corp. It is my privilege to speak this morning on behalf of Indiana Utility Group with respect to the Draft Antidegradation Standards and Implementation Procedures. The IUG's members include the 14 electric and gas utility members of the Indiana Energy Association as well as Dominion State Line Energy, Indiana Kentucky Electric Corporation, Wabash Valley Power, and Hoosier Energy REC, Inc. The IUG appreciates the opportunity to participate throughout the development of the rulemaking for Antidegradation Standards and Implementation Procedures in Indiana. It is critical in this time of transition for the electric power industry that IDEM develop antidegradation standards and implementation procedures that are (i) reasonable in balancing protection of water quality and promotion of economic development opportunity, (ii) clear in their meaning and operation, and (iii) not more restrictive than other USEPA Region V states.

The draft of the Antidegradation Standards and Implementation Procedures proposed by IDEM on May 9, 2011 is an improvement over previous drafts of this important rule proposal and has clearly benefited from the valuable interactive process of this rulemaking. IUG has participated in oral and written comments to this effort over the past several months and commends to the Board the administrative record that reflects IUG's comments. While the IUG does not oppose preliminary adoption of the

draft rule, the IUG believes, however, that further improvements are needed in the next phase of the rulemaking for the draft rule to attain the objectives of reasonableness and clarity in its meaning and method of operation as reflected in its written comments and as offered today in only a cursory fashion.

First, the IUG believes that several key definitions are unclear and vague. Definitions are important because carefully crafted definitions contribute to the regulatory certainty needed by the electric power industry (and other industrial stakeholders) to secure the financial resources necessary for the construction of appropriate waste water treatment technologies and other facilities. It also allows the industry to continue to invest wisely in Indiana, promote economic investment and create jobs. The following examples are illustrative of the need for IDEM to further refine and improve the clarity of the definitions included in the draft rule:

a) "Deliberate action" is not a defined term in the draft rules and thus fails to provide regulatory certainty for when an antidegradation review is triggered under the draft rule. It would be more appropriate to trigger the need for an antidegradation review off an action that requires a new permit or a permit modification. Those actions are clearly and legally defined.

b) The term "available loading capacity" and "total loading capacity" are so vague in their text that they will be subject to misinterpretation and question. Thus, revision will be needed to satisfactorily improve clarity. Also, a modification is needed to both definitions to correct what we believe to be a mistaken

requirement for an approved alternative mixing zone for streams that are involved in an antidegradation review.

c) The term "regulated pollutant" needs to be used consistently throughout the rule, removing all references to "pollutants" and "parameters" and "substances" and replacing them with the term "regulated pollutant." Further, we believe that a revision is needed to this definition to clarify that narrative criteria can be the basis of a "regulated pollutant" that is subject to antidegradation review only if a numeric value has been assigned to a pollutant or pollutants to represent the intent of the narrative criterion. Otherwise, it is not feasible to implement *de minimis* concepts.

d) The definition of "threatened and endangered species" needs revision to cross reference the definition as stated in the federal Endangered Species Act and the Indiana authority. The current reference to a list or database that is subject to internal agency revision without notice or review is inappropriate and such list should only be referred to as guidance, unless such list or database is subject to formal rulemaking.

e) That it would be more precise for the definition for "toxic substances" to reference Section 307(a)(1) of the Clean Water Act. As stated in this draft the definition is too broad using the term as substances that "are or may become harmful."

f) A definition is needed for "minimal degradation" in 327 IAC 2-1.3-5(c)(1). It is not clear what significance this term has.

Additional refinement of the implementation procedures of the draft rule is needed to provide for greater clarity and certainty in the rule's operation and to be sure that Indiana is mindful of socioeconomic factors while being protective of the environment. The IUG urges IDEM to further refine the draft rule to that end and includes the following illustrative suggestions:

a. That the U.S. Supreme Court in the Entergy Corp v. Riverkeeper decision left open the issue as to whether economic feasibility could be considered in regards to antidegradation; therefore, the agency should clarify that the social and economic factors analysis be broad enough to incorporate local, state, and regional impacts. The language set forth at 327 IAC 2-1.3-5(g)(5) at the beginning should be revised as follows: "Where relevant, the anticipated impact on economic and social factors on a local, state and regional basis, as appropriate." .This would allow for the consideration of the benefits that a local community might receive from a power plant that is located many miles away.

b. That with regard to 316(a) variances, the exception for ONRWs is not appropriate. Such variances, which are allowed by section 316(a) of the Clean Water Act, are given by IDEM when a power company can "assure the protection and propagation of a balanced, indigenous community of shellfish, fish and wildlife in and on the body of water into which the thermal discharge is made." If an entity fully met

the 316(a) criteria, the applicable CWA protections would be achieved to include protecting the existing uses and therefore should be exempt from antidegradation review. The EPA's Water Quality Standards Handbook states that "The requirement for potential water quality impairment associated with thermal discharges contained in [40 CFR 131.12(a)(4)]. is intended to coordinate the requirements and procedures of the antidegradation policy with those established in the Act for setting thermal discharge limitations." The statutory scheme and legislative history indicate that limitations developed under section 316 take precedence over other requirements of the Act."

c. That the agency reconsider the substantial restriction on availability of the *de minimis* exclusion from a significant lowering proposed in 327 IAC 2-1.3-4(c)(1)(A) with the requirement for maintenance of 90% of the original available loading capacity.

d. And finally that the agency clearly articulate that water quality improvement projects include trading projects.

In closing, we recognize the effort the agency has undertaken with its draft rulemaking and urge that it continue those efforts to strike the appropriate balance between the protection of the quality of Indiana waters and provision of reasonable safeguards and regulatory certainty to promote the growth of Indiana's economy. The prompt resolution of these issues is important to IUG members in order to allow its member organizations to continue to invest in Indiana.

We are pleased to have the opportunity to raise these issues today with this group so that those attending will be informed of the nature of the revisions the Indiana Utility Group will continue to request in subsequent phases of this rulemaking.